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IN THE

# Supreme Court of the United States

NENITA SABATER, M.D.,

*Petitioner*

v.

MICHAEL BIAS,

*Respondent*

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER IN A CASE INVOLVING AN ALLEGATION OF DELIBERATE INDIFFERENCE BY A PHYSICIAN TO THE SERIOUS MEDICAL NEEDS OF A PRISONER, THE ISSUE OF THAT PHYSICIAN'S SUBJECTIVE KNOWLEDGE CANNOT BE REACHED UNLESS AND UNTIL THERE IS EVIDENCE OF EXPOSURE TO A SUBSTANTIAL RISK OF SERIOUS HARM?

II. ADDITIONALLY, IN SUCH A CASE, WHETHER THE EVIDENCE OF EXPOSURE TO A SUBSTANTIAL RISK OF SERIOUS HARM MAY BE INFERRED BY LAYMEN OR IS REQUIRED TO BE ESTABLISHED BY EXPERT MEDICAL TESTIMONY?

## PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Nenita Sabater, M.D.

Respondent, Michael Bias

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

I. WHETHER IN A CASE INVOLVING AN ALLEGATION OF DELIBERATE INDIFFERENCE BY A PHYSICIAN TO THE SERIOUS MEDICAL NEEDS OF A PRISONER, THE ISSUE OF THAT PHYSICIAN'S SUBJECTIVE KNOWLEDGE CANNOT BE REACHED UNLESS AND UNTIL THERE IS EVIDENCE OF EXPOSURE TO A SUBSTANTIAL RISK OF SERIOUS HARM?

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PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....vii

PETITION.....1

CITATIONS OF THE OFFICE AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS.....2

BASIS FOR JURISDICTION.....3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....4

STATEMENT OF THE CASE.....6

(1) STATEMENT OF FACTS.....6

(2) BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.....11

REASONS FOR GRANTING THE WRIT.....11

I. **The Court of Appeals has misinterpreted the evidentiary foundation necessary to establish that a physician has been deliberately indifferent to the serious medical needs of a prisoner.**

II. **The decision in this case casts a chill on qualified immunity for physicians employed in the area of dispensing medicine and medical treatment to prisoners.**

III. **Fact finders in deliberate indifference cases involving medical treatment by a physician should not be permitted to draw conclusions involving medical treatment without a proper medical expert foundation being laid down.**

IV. **This case misinterprets this court's opinions in *Estelle v. Gamble,* 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).**

ARGUMENT.....13

CONCLUSION.....23

APPENDIX

A. ORDER (dated 7/8/2002)

B. MEMORANDUM OPINION (dated 7/26/2002)

C. JUDGMENT (dated 6/16/2005)

D. OPINION OF THE COURT OF APPEALS

1. Majority Opinion by Judge DeMoss

2. Concurring Opinion by Judge Dennis

3. Dissenting Opinion by Judge Owen

E. TEXT OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

## TABLE OF CITED AUTHORITIES

PAGE

**CASES:**

*Estelle v. Gamble*,
429 U.S. 97 (1976).....12, 18, 20, 21

*Farmer v. Brennan*,
511 U.S. 825 (1994).....13, 19, 20, 21

**STATUTES**

42 U.S.C. § 1983.....1, 5, 11

**AMENDMENTS TO THE UNITED STATES CONSTITUTION**

EIGHTH.....1, 4

FOURTEENTH.....1, 4

## PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on July 29, 2008, in a case involving a claim of deliberate indifference of a physician to the serious medical needs of a prisoner pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

## OPINIONS BELOW

The decisions in the trial court were not reported.

The decision of the Court of Appeals was not reported. Each of the three Judges wrote separately. There was a main opinion authored by Judge DeMoss, a concurring opinion authored by Judge Dennis and a dissenting opinion authored by Judge Owen.

All trial and appellate opinions are contained in the attached Appendix.

## BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals was entered on July 29, 2008.

This Court has jurisdiction to review a final judgment of the United States Court of Appeals by petition for writ of certiorari pursuant to 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Eighth Amendment to the United States Constitution:**

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

**Applicable Portion of the Fourteenth Amendment to the United States Constitution:**

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (the full text of the Fourteenth Amendment is set out in the Appendix)

**42 U.S.C. § 1983:**

**"Civil action for deprivation of rights**

**Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable**

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

## STATEMENT OF THE CASE

## STATEMENT OF FACTS.

For ease of identification the following will be used throughout this petition:

Petitioner will be called "Sabater."

Respondent will be called the "Bias."

The initial recitation of the facts in this case are copied from the written dissent filed by Circuit Judge Owen in this case:

"The facts are essentially undisputed. Bias attempted suicide sometime during the evening of May 20 by slicing his wrist and ingesting prescription drugs he had surreptitiously saved over a period of almost a month. The district court did not find that Sabater had any responsibility for Bias's possession or

ingestion of those drugs. Nor was Sabater on duty or present at the prison on May 20 when the suicide attempt occurred. Other medical personnel attended Bias after his attempt to take his own life, and when asked if he had taken any medication, he repeatedly replied that he had only taken what Sabater had prescribed and in the amounts prescribed. Bias's drug ingestion was not known to any prison official or attendee, including Dr. Sabater, until long after Bias had left the Allred facility.

Sabater saw Bias at approximately noon on the day after his suicide attempt. She examined him, concluded that he remained clinically depressed and requested TDCJ to transfer Bias by its next available transport to the Montford Unit, where TDCJ's psychiatric unit was located.

The TDCJ van did not arrive until about 7:30 the next morning, May 22. Prison officials ordered Bias from his cell, but he did not respond. A use-of-force team was called to remove Bias from his cell, and the team recorded the events on videotape. The video shows Bias lying on his back, without clothing, on a 'suicide blanket.' The guards on the team ordered Bias to 'wake up' and 'open [his] eyes.' Bias responded by raising his head and titling it slightly. The guards used an ammonia inhalant, to which Bias responded with a groan and slight movement. The remainder of the video reflects that Bias appeared motionless and limp as the guards dressed him, handcuffed him, and laid him on a gurney. At least twice during the video, Dr. Sabater and a nurse appeared and took Bias's vital signs, which were normal. Dr. Sabater testified at trial that based on

those diagnostics and observations she concluded her original diagnosis of clinical depression explained Bias's physical condition. The videotape concludes with guards placing Bias in the TDCJ van on his back in a confined space.

Josie Grubbs, a nurse present during the transfer, told Allred investigators that 'in hindsight a drug screen may have been [of] some assistance in determining Offender Bias's condition,' but that she had no reason to believe that an overdose caused his condition. Curtis Cooper, as associate clinical psychologist also present, told the investigators that Bias was unresponsive to the ammonia inhalant and speculated his condition was due to 'waxy flexibility,' which he described as the brain and body working asynchronously. Cooper further stated that 'although Dr. Sabater could have requested an opinion of

another physician,' that was not in her nature. Nontheless, Cooper stated 'Offender Bias's vital signs were within acceptable range and there was no other indicator present' to suggest an overdose."

At trial only Bias testified for the plaintiff. He produced no medical evidence that at the time of Sabater's order for transport and his placement in the TDCJ van for transport that any serious medical condition existed that required immediate attention by Dr. Sabater.

The district court reasoned that the videotape which appeared to display Bias in a comatose state was an open and obvious demonstration that Bias required immediate monitoring or other immediate medical attention, although no identification of what that treatment or monitoring might be was identified.

The district court found that Dr. Sabater, a psychiatrist, had been deliberately indifferent to the serious medical needs of Bias and awarded compensatory damages for physical disfigurement of $103,800.00; $50,000.00 in compensatory damages for physical pain and suffering, mental anguish and emotional distress; and costs including reasonable attorney fees, in the amount of $6,003.62 against Sabater.

**THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE:**

Federal Question Jurisdiction: 42 U.S.C. § 1983

**REASONS FOR GRANTING THE WRIT**

I. **The Court of Appeals has misinterpreted the evidentiary foundation necessary to establish that a physician has been**

deliberately indifferent to the serious medical needs of a prisoner.

II. The decision in this case casts a chill on qualified immunity for physicians employed in the area of dispensing medicine and medical treatment to prisoners.

III. Fact finders in deliberate indifference cases involving medical treatment by a physician should not be permitted to draw conclusions involving medical treatment without a proper medical expert foundation being laid down.

IV. This case misinterprets this court's opinions in *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).

## ARGUMENT

The dissent by Judge Owen stated that: "The district court's opinion reflects that Dr. Sabater's liability was predicated on three conclusions. The first was, '[t]he Court finds that a reasonable person would have known that her conduct in ordering the transportation of an inmate in Bias' condition to a prison unit 150 miles away, rather than providing immediate medical attention, would cause a significant delay, if not a complete denial, of medical care.' The record is devoid of any evidence that Bias required immediate medical attention or that transporting him 150 miles would subject him to a substantial risk of injury. Only a health care expert could make such as assessment in this case, and there was no expert testimony or opinion from any source that was critical of Dr. Sabater's care of Bias."

"The district court seems to have based its finding of deliberate indifference largely, if not entirely, on the videotape. The second conclusion in the district court's opinion is that 'the Court finds that plaintiff's condition on May 22, 1997 was an exceptional circumstance obviously requiring immediate medical attention. A review of the videotape along with the testimony presented at trial confirms this finding.' However, the three health-care professionals who attended Bias while he was being prepared to be taken to the Montford Unit actually examined Bias. His eyes and pupils were examined. His vital signs were checked, more than once, and they were normal. None of the three attending professionals thought at the time that transporting Bias to the Montford Unit would place him at risk. All of this is undisputed. A

layperson cannot independently draw the conclusion that Bias was at risk just because, in hindsight, it is now known that Bias was injured during the transportation."

. . . .

"The third conclusion in the district court's opinion is similar to the others: 'The Court finds that the plaintiff's condition on May 22, 1997, immediately prior to his transport out of the Allred Unit, was open and obvious, that Dr. Sabater was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, that she actually drew that inference and that her intentional failure to act caused a prolonged delay in medical care and resulted in substantial injury to Michael Bias.' Here again, the nature of Bias's condition and the risks that transporting him posed were not matters about which

a layperson has knowledge. If Dr. Sabater had entirely turned her back on Bias and refused to undertake any examination or treatment, this might well be a different case. But she did not. She ordered that he be sent to another facility for care, she continued to examine him, she monitored him, and other health care professionals assisted her. Her professional judgment may have been faulty, but there is no basis for concluding she was deliberately indifferent."

. . . .

". . . . The district court deduced that Bias's limp condition when he was placed in the van made a substantial risk of serious harm obvious. But how does a limp condition allow a layman to conclude that travel in the back of a van for three hours creates such a risk? It is not intuitively or otherwise obvious that

**lying in a prone, immobile position for three hours presents such a risk. Common experience suggests otherwise. There is simply nothing in the record that permits the inferences the district court drew."**

. . . .

**". . . . The facts in this case present 'a classic example of a matter for medical judgment.'[9] 'A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice.'[10] Sabater made the medical decision to transfer Bias to the psychiatric unit at another prison. Without evidence of the standard of care that obtained, a court cannot determine that Sabater deviated from that standard, much less that she acted with deliberate indifference in treating and evaluating Bias.**

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[9] *Id.* At 107
[10] *Id.*

Establishing the standard of care requires specialized knowledge and training. Lay fact-finders cannot determine from their own observations whether a physician's course of conduct was proper. .

The concurring opinion concludes that Bias's 'obvious and emergent condition' distinguishes this case from *Estelle*. What may be 'obvious and emergent' to a layman is a different question from what is obvious and emergent to a physician. Medical personnel routinely encounter patients whose prognosis looks extremely grave to the lay observer, but physicians using medical diagnostics would draw a very different conclusion. Laymen cannot judge whether transportation of a patient in Bias's conditions posed a substantial risk of serious harm."

Sabater raised Qualified Immunity in her pleadings and with a Motion for Summary Judgment in this case.

The majority and concurring opinions at the Court of Appeals misinterpreted *Farmer v. Brennan*, 511 U.S. 825 (1994) citing to *Farmer* at page 842 & n. 8 as permitting the fact finder in this case, which involves medical services by a physician, to declare an "open and obvious" and "an exceptional circumstance obviously requiring immediate medical attention" from which Dr. Sabater "was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed." The effect of the decision by the Court of Appeals relying on *Farmer, supra*, was to interpret *Farmer* to permit a layperson fact finder in a physician services case to find a risk to the serious medical needs of a prisoner without the necessity of

proving that at the time the accused physician was involved in providing or not providing services that the prisoner had a serious medical need. The fact finder under the reasoning of this case as an interpretation of *Farmer, supra*, finds that a layperson fact finder may now "infer" a serious medical need without the benefit of expert medical opinion. The concurring opinion then concluded that Bias's 'obvious and emergent condition' distinguished this case from *Estelle v. Gamble*, 429 U.S. 97 (1976) As stated in the dissenting opinion: "A layman cannot make a determination that such a risk existed without the aid of expert testimony. This is not a close case, . . ."

Once proper medical testimony establishes that a serious risk to the medical needs of the prisoner existed at the time of treatment or non-treatment by the physician, then the fact finder can proceed to infer

whether or not a reasonable physician in those circumstances would have acted differently and the act or failure to act was evidence of subjective deliberate indifference by the physician in question.

Neither *Estelle* nor *Farmer* permit the fact finding district court to infer a substantial risk of serious harm to the medical needs of the prisoner without proof of what medical needs existed at the time of the incident via proper testimony or evidence.

As stated by the dissent: ". . . None of the physicians or other health care providers who eventually diagnosed Bias were critical of the care that Sabater provided. They did not offer the objective evidence necessary to establish at the time Sabater and the other health care professionals at the prison administered medical care, a substantial risk of serious harm to Bias existed. Bias did not have

necrosis at that time. That condition undisputedly developed while he was in the van. Undoubtedly, Sabater and others failed to diagnose his drug overdose. But there is no evidence that the misdiagnosis even amounted to negligence. Nor is there evidence that placing Bias in a van, rather than an ambulance, posed a substantial risk of serious injury. A layman cannot make a determination that such a risk existed without the aid of expert testimony."

The reach of this case poses a distinct danger of unraveling qualified immunity for physician providers in prison settings and establishing a framework from which physicians can be improperly held liable.

The Supreme Court should grant this Petition and clarify at what point in the evidence there must be expert medical evidence present in order for the fact

finder to draw inferences regarding deliberate indifference by a physician in meeting the medical needs of a prisoner.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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## INDEX TO APPENDIX


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B. MEMORANDUM OPINION (dated 7/26/2002)

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D. OPINION OF THE COURT OF APPEALS

1. Majority Opinion by Judge DeMoss

2. Concurring Opinion by Judge Dennis

3. Dissenting Opinion by Judge Owen

E. TEXT OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

| | | |
|---|---|---|
| MICHAEL BIAS,<br>TDCJ No. 769345,<br>Plaintiff | ) | |
| v. | ) | 7:99-CV-033-R |
| DR. NENITA SABATER,<br>Defendants. | ) | |

**ORDER**

Came on this day to be heard Defendant Sabater's motion for summary judgment and Plaintiff's response thereto and the Court finds and orders as follows:

This is an action brought pursuant to 42 U.S.C. § 1983 by an inmate who, at the time of the events giving rise to his complaint, was confined in the Allred Unit of the Texas Department of Criminal Justice in Iowa Park, Texas.

Plaintiff, Michael Bias, claims that Dr. Nenita Sabater was deliberately indifferent to his serious

claims that, while incarcerated in the James V. Allred Unit of the Texas Department of Criminal Justice, he overdosed on his medication and went into a coma. He alleges that Dr. Sabater did not sufficiently examine him to determine whether he had overdosed, whether he was in danger of going into a coma, or whether he was at risk of developing necrosis in his hip and right side. Mr. Bias claims that, as a result of Dr. Sabater's deliberate indifference to his serious medical needs, he was left lying on his right side without being moved or rotated which cut off the blood circulation causing infection and necrosis. Plaintiff seeks monetary damages for the alleged violation of his Eighth Amendment rights.

Defendant, Dr. Nenita Sabater, denies the plaintiff's allegations. Dr. Sabater claims that she acted in good faith in providing appropriate medical care to Mr. Bias. She claims that she was not deliberately indifferent to his serious medical needs and that she did not violate his rights under the Eighth Amendment.

In support of her motion for summary judgment, Dr. Sabater argues that (1) she is entitled to a qualified immunity defense because Plaintiff has failed to allege a violation of a constitutional right, she acted in good faith, did not violate any clearly established law, and her actions were objectively reasonable; (2) Plaintiff has no evidence to support his allegations; (3) Plaintiff's complaints sounds in negligence which is not actionable under the Civil Rights Act, and; (4) Plaintiff failed to exhaust his administrative remedies prior to filing suit.

In response, Plaintiff argues that Dr. Sabater was aware that he had attempted suicide and that she was aware he was non-responsive and that she was deliberately indifferent to his need for medical care while he was comatose. *See Plaintiff's Brief in Support of His Motion in Opposition to Defendant Dr. Sabater's Motion for Summary Judgment.*

In order to state a colorable claim for the denial of medical care under the Eighth Amendment, an inmate must

allege acts or omissions "sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976). "Deliberate indifference" under the Eighth Amendment occurs only where a prison official subjectively knows of and disregards a substantial risk to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 650 (5th Cir. 1996). A delay in medical care can, in some instances, constitute an Eighth Amendment violation if it results in substantial harm. *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993); *Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990).

While a delay in providing treatment may rise to the level of a constitutional violation, negligent or erroneous medical treatment or judgment does not provide a basis for a § 1983 claim. *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993). As long as jail medical personnel exercise professional medical judgment, their behavior will not violate

a prisoner's constitutional rights. *See Youngberg v. Romeo*, 457 U.S. 307, 322-23, 102 S.Ct. 2452, 2461-62 (1982). A disagreement over the appropriate medical treatment constitutes, at most, a possible claim of medical malpractice appropriately addressed under state law. *E.g., Estelle v. Gamble*, 429 U.S. at 107-08, 97 S.Ct. at 293; *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991); *Fielder v. Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979).

A review of the exhibits submitted by Plaintiff reflect that, immediately prior to Plaintiff being transported out of the Allred Unit, he was unresponsive to verbal orders and was dressed by officers. *Id. at Exhibit "C."* It appears that at least one officer had reservations about transporting Bias because he appeared unconscious. *Id. at Exhibit "D."* A physician at the Montford Unit apparently believed that Plaintiff's necrosis and infection was the result of a compression in jury that occurred prior to his arrival at the Montford Unit. *Id. at Exhibit "H."*. One of Defendant Sabater's exhibits reflects that when Bias arrived at the

Robertson Unit, he was lying on the floor of the transport van, his skin was displaced and he was not responsive to verbal stimuli or painful stimuli. *Appendix to Defendant's Motion for Summary Judgment p. 20.*

It is clear from the record and Plaintiff does not dispute, that he received some medical care from the Texas Department of Criminal Justice. However, there remains disputed factual issues related to Dr. Sabater's knowledge of Plaintiff's condition and with regard to the reasonableness of her conduct under the circumstances. Absent a determination on the disputed facts of this case, the Court cannot make a determination as to whether or not Plaintiff was wrongfully denied care under the circumstances. *See Harris v. Hegmann,* 198 F.3d 153, 159 (5th Cir. 1999) (finding that a colorable Eighth Amendment claim was stated where the inmate alleged that his repeated requests for medical treatment after the failed surgical repair of a broken jaw were ignored).

Defendant moves for summary judgment on the basis of qualified immunity. Government officials are entitled to qualified immunity from suit when performing discretionary functions unless their conduct violated statutory or constitutional rights, clearly established at the time of the alleged incident, of which a reasonable person would have known. *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995). The question of qualified immunity should be resolved at the earliest possible stage of litigation because it involves an entitlement to immunity from suit. *Hunter v. Bryant*, 502 U.S. 224, 226 112 S.Ct. 534, 536 (1991); *accord Gibson*, 44 F.3d at 277.

Unfortunately, the Court is unable to determine, upon the present record, whether or not Dr. Sabater is entitled to qualified immunity. Plaintiff has stated a colorable Eighth Amendment claim that he was denied medical care. This right was clearly established at the time of the alleged violation. Here, genuine issues of material fact remain with regard to the facts and circumstances surrounding the alleged

violation and Dr. Sabater's alleged involvement. Such factual issues go directly to the heart of the question of qualified immunity. While it may ultimately be found that Dr. Sabater is entitled to qualified immunity, the Court cannot make that determination based upon the record currently on file in this case. Questions remain, the answers to which are necessary for the court to make factual determinations with regard to the conduct of Defendant Sabater and whether such conduct, if any, rose to the level of a constitutional violation of which a reasonable person would have known. Therefore, Defendant Sabater is not entitled to qualified immunity at this time.

Next, Defendant claims that she is entitled to summary judgment because Plaintiff failed to exhaust his administrative remedies prior to filing this lawsuit. Under the Prison Litigation Reform Act of 1995, inmates bringing legal challenges to prison conditions are required to exhaust administrative remedies prior to filing suit. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, ____, 122 S.Ct.

983, 988 (2002). The United States Supreme Court recently clarified the meaning of "prison conditions" by holding that the exhaustion requirement applies to "all inmate suits about prison life, whether they involve general circumstances or particular episodes." *Porter*, 122 S.Ct. at 922.

Defendant concedes that Plaintiff did file administrative grievances concerning part of the subject matter of this case. She argues, however, that the grievances did not refer to her "fail[ure] to adequately treat Bias' suicidal tendencies." *Brief in Support of Defendant Sabater's Motion for Summary Judgment p. 8.* The Court disagrees. Plaintiff filed three grievances. In his first grievance he complained that, following an overdose of pills, he was not provided proper medical care and was not immediately transferred via ambulance to a hospital. *Appendix to Defendant's Motion for Summary Judgment pp. 5-7.* He alleged that the failure to provide him with proper treatment or immediately transport him to a hospital resulted in the injury to his hip. *Id. at p. 7.* In his second grievance,

Plaintiff maintains that he was unconscious and that the officers should have called an ambulance to transport him. *Id. at p. 9.* Plaintiff states in his third grievance that he took an overdose of pills which resulted in his becoming comatose and that, while comatose, he was left in one position so long that his circulation was cut off. *Id. at p. 3.* It is clear that Plaintiff's grievances raised the issue of the propriety of the medical care he received while confined in the Allred Unit following his drug overdose. Accordingly, the Court concludes that Plaintiff exhausted his administrative remedies prior to filing this lawsuit.

Summary judgment is proper when the pleadings and evidence illustrate that no genuine issue exists as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 170 (5th Cir. 1991). Disputes concerning material facts are genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Douglass v. United Servs. Auto. Ass'n,*

79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986)). Substantial law provides that an issue is "material" if it involves a fact that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510; *Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633, 635 (5th Cir. 1994). The nonmovant is not required to respond to the motion until the movant properly supports his motion with competent evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988).

When a movant carries his initial burden, the burden then shifts to the nonmovant to show that the entry of summary judgment is appropriate. *Celotex*, 477 U.S. at 322-24, 106 S.Ct. at 2552-53; *Duckett v. City of Cedar Park, Tex.*,

950 F.2d 272, 276 (5th Cir. 1992). Although the nonmovant may satisfy this burden by tendering depositions, affidavits, and other competent evidence, "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden," *Douglass,* 79 F.3d at 1429, as "the adverse party's response ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e). Merely colorable evidence or evidence not significantly probative, however, will not defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11. Further, a mere scintilla of evidence will not defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512; *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994).

Summary judgment evidence is viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); *Rosado v. Deters*, 5 F.3d

119, 123 (5th Cir. 1993). In addition, factual controversies are resolved in favor of the nonmovant, but only when both parties have submitted evidence of contradictory facts, thus creating an actual controversy. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). In the absence of any proof, however, the Court does not assume that the nonmovant could or would prove the necessary facts. *Id.*

In making its determination on the motion, the Court looks at the full record including the pleadings, depositions, answers to interrogatories, admissions, and affidavits. Fed. R. Civ. P. 56(c); *William v. Adams*, 836 F.2d 958,961 (5th Cir. 1988). However, "the [Court's] function is not [ ]to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511. The movant's motion for summary judgment will be granted if he meets his burden and the nonmovant fails to make the requisite showing that a genuine issue exists as to any material fact.

Fed.R.Civ.P. 56(c); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1119 (5th Cir. 1992).

The summary judgment evidence presented in this case establishes that there are genuine issues of material fact that remain with regard to Dr. Sabater's claim of qualified immunity. The evidence further establishes that Plaintiff exhausted his administrative remedies prior to filing this lawsuit.

IT IS THEREFORE ORDERED that Defendant's motion for summary judgment is DENIED.

SO ORDERED this 8 day of July, 2002.

JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

| | | |
|---|---|---|
| MICHAEL BIAS,<br>TDCJ No. 769345,<br>Plaintiff | ) | |
| v. | ) | 7:99-CV-033-R |
| LESLIE WOODS, et al.,<br>Defendants. | ) | |

**MEMORANDUM OPINION AND ORDER**

On the 8th day of July, 2002, came on for trial the above styled and numbered cause wherein *pro se* plaintiff Michael Bias and, through counsel, defendant Nenita Sabater, M.D. appeared before this Court.[1] There being no timely demand for a jury trial, the case was tried before the Court.

The action was brought pursuant to 42 U.S.C. § 1983 by an inmate who, at the time of the events giving rise to his complaint, was confined in the Allred Unit of the Texas Department of Criminal Justice in Iowa Park, Texas.

[1] Plaintiff's claims against all defendants except Dr. Sabater were dismissed prior to trial.

Plaintiff claims that, on May 20, 1997, he was denied proper medical care in violation of his Eighth Amendment rights after he attempted suicide by taking an overdose of psychiatric medication and cutting his left wrist. *Complaint* ¶ *V.* Plaintiff alleges that Dr. Nenita Sabater failed to transport him to the hospital after he slipped into a coma and that he remained comatose for two days. *Id.* On May 22, 1997, pursuant to Dr. Sabater's order, Plaintiff claims he was transported approximately 150 miles to the Robertson Unit in Abilene, Texas where, upon arrival, medical personnel sent him to the Hendricks Medical Center. *Id.* At Hendricks, doctors determined that Bias suffered necrosis and other tissue damage to his right hip, leg and buttock as a result of lying on his right side for an extended period of time during his coma. *Id.*

Plaintiff states that he was hospitalized in the Hendricks Medical Center for thirteen days then transported to the Montford Unit Regional Medical Facility where a physician, Dr. Cofie, confirmed the diagnosis of necrosis

and other tissue damage to plaintiff's right hip, leg and buttock as a result of lying on his right side for an extended period of time. *Id.* Bias was then transported to the University Medical Center where he underwent to surgical procedures and spent thirty days recovering in the burn unit. *Id.* Afterward, Bias states that he underwent five months of physical therapy. *Id.* Bias claims that Dr. Sabater was deliberately indifferent to his need for medical care and that his injuries resulted from her failure to provide such care. *Id.* He now seeks monetary damages for plastic surgery to repair his scars. *See id. at ¶ VI; Plaintiff's Supplemental Complaint p. 7.*

Defendant, Dr. Nenita Sabater, denies the plaintiff's allegations. Dr. Sabater claims that she acted in good faith in providing appropriate medical care to Mr. Bias and that her conduct was objectively reasonable. *Answer of Dr. Nenita Sabater, M.D. p. 2.* She claims that she was not deliberately indifferent to his serious medical needs, that

she did not violate his rights under the Eighth Amendment and that she is entitled to qualified immunity from suit. *Id.*

In order to state a colorable claim for the denial of medical care under the Eighth Amendment, an inmate must allege acts or omissions "sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976). "Deliberate indifference" under the Eighth Amendment occurs only where a prison official subjectively knows of and disregards a substantial risk to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 650 (5th Cir. 1996). Liability under the Eighth Amendment require that a prison official be aware of facts from which an inference could be drawn that a substantial risk of serious harm exists, and he must actually draw that inference. *Farmer*, 511 U.S. at 837, 114 S.Ct. at 1979. "Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by

the obviousness of the substantial risk." *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999) (quoting *Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir. 1994)).

A prison official may be "deliberately indifferent" so as to give rise to a § 1983 civil rights action if the official intentionally denies or delays a prisoner's access to medical care and such conduct results in substantial harm. *E.g. Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993); *Walker v. Butler*, 967 F.2d 176, 178 (5th Cir. 1992); *Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990); *see Harris v. Hegmann*, 198 F.3d at 159 (finding that a colorable Eighth Amendment claim was stated where the inmate alleged that his repeated requests for medical treatment, after the failed surgical repair of a broken jaw, were ignored).

While a delay in providing treatment may rise to the level of a constitutional violation, negligent or erroneous medical treatment or judgment does not provide a basis for a § 1983 claim. *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993). As long as jail medical personnel exercise

professional medical judgment, their behavior will not violate a prisoner's constitutional rights. *See Youngberg v. Romeo*, 457 U.S. 307, 344-43, 102 S.Ct. 2452, 2461-62 (1982). A disagreement over the appropriate medical treatment constitutes, at most, a possible claim of medical malpractice appropriately addressed under state law. *E.g. Estelle v. Gamble*, 429 U.S. at 107-08, 97 S.Ct. at 293; *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991); *Fielder v. Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979).

At trial, testimony revealed that Michael Bias arrived at the Allred Unit on May 1, 1997 with a history of suicide attempts. Dr. Sabater was Bias' treating psychiatrist during his confinement in the Allred Unit. Dr. Sabater diagnosed Mr. Bias as suffering from clinical depression. She and her staff provided counseling services twice each week and prescribed anti-depressant and anti-psychotic medications for Mr. Bias. Dr. Sabater was aware that Plaintiff had suicidal thoughts, however, he indicated to her staff that he would not attempt to commit suicide. On May

20, 1997, Bias attempted suicide by slashing his wrist and by taking an overdose of seven different medications he had collected for about a month by obtaining his daily medications and saving them. For his own safety, Bias was placed in a suicide watch cell with nothing but a blanket.

The next day, May 21, 1997, Dr. Sabater saw the plaintiff in his comatose state. She concluded that he suffered from severe depression and that he was withdrawn and did not want to talk. She testified that, on May 21, 1997, she recommended the plaintiff's transfer to the Montford Unit was specializes in psychiatric treatment, however, he was not transported until the next day.[2] Dr. Sabater testified that, because she did not see plaintiff until twelve to sixteen hours after his overdose, she could have done nothing different in treating him for the overdose. Dr. Sabater claims that she was not aware that Plaintiff had

[2] Although Dr. Sabater testified that she recommended the transfer to the Montford Unit in Lubbock, Texas, Plaintiff was transferred to the Robertson Unit in Abilene, Texas. There is nothing in the record to explain this discrepancy.

taken the drugs and that the medical records indicate that Bias denied taking any drugs.

The testimony and exhibits presented at trial reflect that, on May 22, 1997, Michael Bias was transported from Allred to the Robertson Unit at the direction of Dr. Sabater. *See Defendant's Trial Exhibit No. 1 p. 6, and p. 1 of Clinical Notes, attached thereto.* This fact was undisputed at trial. Bias was transported 150 miles during which time he did not awaken and did not move. *Defendant's Trial Exhibit No. 1 p. 15.* Plaintiff testified that, as a result of being transported in a comatose state where he was placed in a prone position on the floor of a van without being moved, he suffered a compression injury causing necrosis and infection in his right hip, buttocks and thigh. The exhibits submitted at trial support plaintiff's testimony. The cause of his injuries (i.e. – being transported while unconscious) was not disputed by defendant at trial.

The record reflects that Bias suffered necrotizing soft tissue infection that required a skin graft in the right

gluteal area with followup treatment in the University Medical Center Burn Clinic. *Plaintiff's Trial Exhibit No. 1 pp. 27, 87, 92, 101 & 136.* Medical records indicate that Bias had a wound in his right hip region approximately 10 inches in diameter. *Id. at p. 155.* The record reflects that the "graft region begins [on] the upper outer [right] thigh and ends approximately mid-calf from mid-calf to outer calf." *Id.* There is "also a graft site to [his] left inner thigh approximately 8"x6"." *Id.* The Court viewed Bias' right hip, thigh and leg and confirmed that he suffered substantial physical injury.

Bias testified that he suffered permanent disfigurement and that he suffers continuing medical problems resulting from his injuries. He testified that he lost the skin from his right leg up to his hip, that there remains a hole in his right gluteus maximus, that his right buttock is gone and that he can't set or stand too long because of the nerve damage and muscle loss. The exhibits submitted at trial support Bias' claims of injury and

continuing medical problems and such claims were unrefuted by defendant at trial. *See Plaintiff's Trial Exhibit No. 1 pp. 168, 208, 218 & 220.*

A videotape, taken by Allred Unit officials on May 22, 1997, reflects the circumstances surrounding Bias' preparation for transport from the Allred Unit to the Robertson Unit. The videotape was submitted as an exhibit with Defendant's Motion for Summary Judgment and was admitted by the Court at trial as the Court's Exhibit No. 1. The video clearly reflects that Mr. Bias was lying naked on the floor of his cell and that he was not responsive to orders given by guards. A use-of-force team entered the cell and tried to awaken Mr. Bias. An ammonia capsule was used in an attempt to awaken him at which time he appeared to groan and exhibit some slight movement. Dr. Sabater is on the videotape and appears to be supervising the preparation to transport Bias out of Allred. Bias' vital signs were checked twice during this process and they were normal.

At least one officer, Dalton Agnew, had reservations about transporting Bias because Bias appeared unconscious. *Defendant's Trial Exhibit No. 1 p. 13.* Agnew contacted his supervisor and was directed to continue with transport. *Id.* When Mr. Bias arrived at the Robertson Unit, he was lying on the floor of the transport van, his skin was displaced and he was not responsive to verbal stimuli or painful stimuli. *Id. at p. 2.* Bias testified that a physician at the Robertson Unit had him transported to the hospital by ambulance.

Upon consideration of the papers, pleadings, testimony and other evidence presented in this case, the Court initially finds that Dr. Sabater's qualified immunity defense must fail. Government officials are entitled to qualified immunity from suit when performing discretionary functions unless their conduct violated statutory or constitutional rights, clearly established at the time of the alleged incident, of which a reasonable person would have known. *Gibson v. Rich,* 44 F.3d 274, 277 (5th Cir. 1995). An inmate's right to medical care under the

Eighth Amendment was clearly established at the time of the incidents giving rise to this lawsuit. The Court finds that a reasonable person would have known that her conduct in ordering the transportation of an inmate in Bias' condition to a prison unit 150 miles away, rather than providing immediate medical attention, would cause a significant delay, if not a complete denial, of medical care.

Upon further consideration of the papers, pleadings, testimony and other evidence presented in this case, the Court finds that plaintiff's condition on May 22, 1997 was an exceptional circumstances obviously requiring immediate medical attention. A review of the videotape along with the testimony presented at trial confirmed this finding. The Court finds that the plaintiff's condition on May 22, 1997, immediately prior to his transport out of the Allred Unit, was open and obvious, that Dr. Sabater was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, that she actually drew that inference and that her intentional failure to act

caused a prolonged delay in medical care and resulted in substantial injury to Michael Bias. The Court finds that defendant Sabater was deliberately indifferent to the serious medical needs of Michael Bias and that her conduct resulted in his injuries.

IT IS THEREFORE ORDERED that defendant Sabater is liable for plaintiff's injuries under 42 U.S.C. § 1983. Monetary damages will be determined at a later date after any further proceedings which may be deemed necessary by the Court. Final judgment will be entered at that time.

SO ORDERED this 24th day of July, 2002.

JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

| | | |
|---|---|---|
| MICHAEL BIAS,<br>TDCJ No. 769345,<br>Plaintiff | ) | |
| v. | ) | 7:99-CV-033-R |
| LESLIE WOODS, et al.,<br>Defendants. | ) | |

**JUDGMENT**

The issues in this case having been duly tried and decisions having been duly rendered, the Court now renders judgment for Plaintiff Michael Bias against Defendant Nenita Sabater as follows:

1. The sum of $103,800.00 in compensatory damages for physical disfigurement;
2. The sum of $50,000.00 in compensatory damages for physical pain and suffering, mental anguish and emotional distress;
3. Costs, including reasonable attorney fees, in the amount of $6,003.62, and;

4. Interest on the above amounts at the rate of 3.30% per annum from the date of entry of this judgment until those amounts with interest are paid.

This Court reserves jurisdiction over the parties and over this action solely for the purpose of enforcing this judgment.

SO ORDERED this 16th day of June, 2005.

JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 05-10890

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MICHAEL BIAS

Plaintiff-Appellee

v.

LESLIE WOODS, et. al,

Defendants

NENITA SABATER

Defendant-Appellant

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:99-CV-33

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Before DeMOSS, DENNIS, and OWEN, Circuit Judges.
DeMOSS, Circuit Judge:*

Defendant-Appellant Nenita Sabater, M.D. appeals the district court's final judgment holding that (1) she is not entitled to qualified immunity with respect to the 42 U.S.C. § 1983 claim brought against her by Plaintiff-Appellee Michael Bias for violations of his Eighth Amendment right to be free from cruel and

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5THCIR. R. 47.5.4.

unusual punishment, and (2) she is liable under § 1983 for Bias's injuries. We affirm.

## I. Background Facts

Bias arrived at the Texas Department of Criminal Justice's (TDCJ) Allred Unit on May 1, 1997, with a history of at least one suicide attempt. Dr. Sabater was his treating psychiatrist. She diagnosed Bias with clinical depression and prescribed him anti-depressant and anti-psychotic medications. During his stay at the Allred Unit, Bias repeatedly told Dr. Sabater and her staff that he was having suicidal thoughts. Bias specifically stated that he had a "suicide plan," although he indicated to Dr. Sabater's staff that he would not follow through with his plan for at least one month. On May 20, 1997, Bias attempted suicide by slashing his left wrist and taking an overdose of seven different medications that he had collected from daily pill call and saved since his arrival in the Unit.[1]

Following his suicide attempt, officers placed Bias in a suicide-watch cell with no clothing and nothing but a "suicide blanket." Clinic notes from May 20, 1997, state that Bias was "sitting on the side of the bed" and was "awake, alert, and co-operative." In the early morning hours of May 21, 2007, Bias was "lethargic" but was made "easily alert" with an ammonia inhalant. The clinic notes go on to state that, at this time, Bias "denie[d] taking meds other than his own [and] states he takes meds only as prescribed." On May 21, 1997, approximately twelve to sixteen hours after Bias's suicide attempt, Dr. Sabater first became aware of Bias's unconscious or near-unconscious condition. She concluded that he was

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[1] Although medical records indicate that Bias had seven different medications in his body following the suicide attempt, Dr. Sabater had only prescribed him two medications. There is nothing in the record to explain how Bias obtained the five additional medications.

"suffer[ing] from severe depression and that he was withdrawn and did not want to talk." That same day, she recommended that Bias be transferred to the Montford Unit, the TDCJ's psychiatric facility. However, for reasons that are unclear, Bias was actually transported 150 miles
from the Allred Unit to the Robertson Unit.[2]

A videotape recorded on May 22, 1997, showed Bias being prepared for transport from the Allred Unit. The video is approximately twenty minutes long and initially shows Bias lying on his back, apparently naked, on a "suicide blanket" on the floor. The video shows several correctional officers attempting to rouse Bias to prepare him for transport by telling him to "wake up" and "open [his] eyes." Bias's only responses were to tilt his head to the side and raise his head slightly. Officers attempted to awaken Bias with an ammonia capsule, which resulted in only a groan and some slight movement. Bias appears motionless at all other times throughout the duration of the tape. An officer can be heard asking whether they should "get a nurse to make sure nothing [was] wrong with him" and stating that Bias "can't even hold himself up." Because Bias was unconscious, the officers had to lift Bias into a sitting position in order to dress him and place leg irons and handcuffs on him, a process which took approximately ten minutes. Dr. Sabater appears intermittently on the videotape to

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[2] At least one of the district court's findings was clearly erroneous: the court determined that Bias was transported to the Robertson Unit "at the direction of Dr. Sabater." However, it is undisputed that Dr. Sabater intended to have Bias sent to the psychiatric facility at the Montford Unit. Despite Dr. Sabater's instructions to transfer Bias to the Montford Unit, he was actually transferred to the Robertson Unit. There is nothing in the record to fully explain this discrepancy. However, Officer Dalton Agnew, one of the officers in the transport van, stated that the "paper work said they were en route to the Montford Unit for Psych. appointments," indicating that the Robertson Unit was a stop on the way to the Montford Unit.

supervise Bias's preparation for transport. Bias's vital signs were checked during this time and were normal.

Officers placed Bias in the transport van, on his back, in a confined space on the floor that appeared to be just smaller than Bias's shoulder width. During the transfer, Bias "did not awaken or move." Curtis Cooper, associate clinical psychologist at Allred, told investigators that the ammonia capsule "was of little or no help" in awakening Bias immediately prior to his placement in the van. Linda Barnaby, nurse at the Robertson Unit, stated that upon arrival, Bias was "not responsive to verbal stimuli nor painful stimuli," such as a chest rub or eyelash flick. Almost immediately after Bias's arrival to the Robertson Unit, he was transported to Hendrick Medical Center for an apparent drug overdose. The Trauma Center Note stated that Bias had been "[un]responsive. . . for at least the last 24 hours" and was in a "comatose state." Bias showed signs of multisystem organ failure, but gradually became alert after several days in intensive care.

As a result of being transported in an unconscious or nearly unconscious state on the floor of a van without being moved, Bias suffered a compression injury resulting in necrosis and infection in his right hip, buttocks and thigh. Medical records indicated that he suffered a wound approximately ten inches in diameter that required skin-graft surgery. According to Bias, the injury left "permanent disfigurement." Bias testified that he lost the skin from his right leg up to his hip, that there remained a hole in his right gluteus maximus, that his right buttock is gone, and that he cannot sit or stand too long because of the nerve damage and muscle loss. The district court viewed Bias's right hip, thigh, and leg and confirmed that he had suffered substantial physical injury. Dr. Sabater does not dispute that Bias's transportation in an unconscious state caused his injuries.

## II. Procedural History

In 1999, Bias filed pro se a lawsuit pursuant to 42 U.S.C. § 1983 against three wardens (Leslie Woods, Earl Fox, and Ray Castro), Dr. Sabater, and several unknown officers, all of whom worked in the Allred Unit of the TDCJ. Bias asserted that the defendants had acted with deliberate indifference to his serious medical needs in violation of his Eighth Amendment right to be free from cruel and unusual punishment. *See* U.S. CONST. amend. VIII.

The district court dismissed Bias's suit as frivolous, but did so without prejudice. In January 2000, this Court affirmed the dismissal of the claims against the wardens, vacated the judgment with respect to the dismissal of the claims against Dr. Sabater and the unknown defendants, and remanded the case for further proceedings. *See Bias v. Woods*, No. 99-10709, 2000 WL 122419 (5th Cir. Jan. 31, 2000). After further proceedings irrelevant to this appeal, the district court dismissed Bias's claims against all defendants except Dr. Sabater.

Dr. Sabater filed a motion for summary judgment, arguing that Bias had failed to exhaust administrative remedies, that she was entitled to qualified immunity, and that Bias had failed to state a constitutional violation. The district court denied Dr. Sabater's motion on July 8, 2002. That same day, the court held a bench trial on Bias's claim against Dr. Sabater. In an order dated July 26, 2002, the district court determined that Dr. Sabater was liable for Bias's injuries, and Dr. Sabater appealed. In October 2003, this Court dismissed Dr. Sabater's interlocutory appeal for lack of jurisdiction, concluding that the district court's judgment was not final because damages had not yet been determined. *See Bias v. Woods*, 78 F. App'x 951 (5th Cir. 2003).

On remand, the district court held a hearing on damages and awarded Bias: $103,800.00 in compensatory damages for physical pain and suffering, mental anguish,

and emotional distress; attorney's fees; costs; and interest. Dr. Sabater timely appealed.

## III. Analysis

On appeal, Dr. Sabater argues that the district court erred in denying qualified immunity because: (1) Bias failed to allege a violation of a clearly established constitutional right; (2) Dr. Sabater's conduct was objectively reasonable in light of the clearly established law;[3] and (3) Bias failed to state or prove a claim other than negligence.

We review a district court's conclusions of law de novo. *See Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006). We may not set aside a district court's factual findings unless it is clearly erroneous. *See Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1124 (5th Cir. 1997); FED. R. CIV. P. 52(a).

Government officials performing discretionary functions are protected from civil liability under the doctrine of qualified immunity if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *See McClendon v. City of Columbia*, 305 F.3d 314, 322 (5th Cir. 2002) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Federal courts apply a two-step analysis to qualified immunity claims. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a

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[3] Dr. Sabater separately questions whether the relevant law was "clearly established," but that question is part and parcel of the objective reasonableness analysis. *See Williams v. Kaufman County*, 352 F.3d 994, 1002 n.12 (5th Cir. 2003) ("The district court, however, unnecessarily decoupled the clearly established/objective unreasonableness test of the Supreme Court. That is, if a right is clearly established enough to impart fair warning to officers, then their conduct in violating that right cannot be objectively reasonable.").

constitutional right?" *Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007) (quoting *Saucier*, 533 U.S. at 201). If the answer is yes, the court inquires whether the officer's conduct was objectively reasonable in light of the law that was "clearly established" at the time of the alleged violation. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000).

Bias argues that Dr. Sabater violated his constitutional right to be free from cruel and unusual punishment. *See* U.S. CONST. amend. VIII. The Cruel and Unusual Punishment Clause allows an inmate to obtain relief after being denied medical care if he proves that there was a "deliberate indifference to [his] serious medical needs." *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995)
(quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Deliberate indifference requires a showing that Dr. Sabater (1) was "aware of facts from which an inference of excessive risk to the prisoner's health or safety could be drawn," and (2) that she "actually drew an inference that such potential for harm existed." *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001). Such a showing requires evidence that prison officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wonton disregard for any serious medical needs." *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (quoting *Estelle*, 429 U.S. at 107). A prisoner's disagreement with his medical treatment is not actionable under § 1983 absent exceptional circumstances. *See Banuelos*, 41 F.3d at 235. Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of a substantial risk. *Farmer v. Brennan*, 511 U.S. 825, 842 & n.8 (1994). "[I]t remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety." *Id.* at 844.

After applying the facts to the relevant legal standards, the district court made the following findings: Dr. Sabater was not entitled to qualified immunity because "a reasonable person would have known that her conduct in ordering the transportation of an inmate in Bias'[s] condition to a prison unit 150 miles away, rather than providing immediate medical attention, would cause a significant delay, if not a complete denial, of medical care;" Bias's medical condition on May 22, 1997, was "open and obvious" and "an exceptional circumstance obviously requiring immediate medical attention;" Dr. Sabater "was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed;" Dr. Sabater "actually drew that inference;" and "her intentional failure to act caused a prolonged delay in medical care and resulted in substantial injury to Michael Bias;" and Dr. Sabater was "deliberately indifferent" to Bias's "serious medical needs" and her conduct resulted in his injuries.

After thoroughly reviewing the briefs and relevant portions of the record, we find no clear error in the district court's factual findings and affirm for essentially the same reasons stated by the district court in its written order. AFFIRMED.

DENNIS, Circuit Judge, specially concurring.

I fully concur in the correct and well crafted majority opinion and write further only to emphasize certain facts and legal principles that additionally support its conclusion.

Having reviewed the record in this case, including the much-discussed videotape, I cannot conclude that the district court clearly erred in finding that Bias's helpless, unconscious condition obviously required either immediate treatment or continuing medical attendance, that Dr. Sabater knew of and understood this condition, and that Dr. Sabater deliberately placed Bias in a situation in which she knew that he would receive no medical (or even medical technician) attention for several hours by approving his transportation, unconscious and horizontally crammed on the floor of a van not equipped for non-ambulatory patient use. The record also confirms that when Bias arrived at the Robertson unit, after several hours of unconsciously enduring his dangerously inadequate transportation conditions, he was immediately sent to a hospital emergency care facility, where he was not only immediately diagnosed as suffering from a drug overdose but also found to suffer from necrosis as a result of being cramped in the van unconscious and on his back and side for several hours. Finally, the record shows that this transport-induced injury led to Bias's need for multiple surgeries and to the loss of his right buttocks, *inter alia*. Thus, my study of the record, including Bias's compiled medical records, has confirmed my agreement that we should affirm the district court's judgment because we cannot say that it is clearly erroneous.

To prove "deliberate indifference" Bias needed to demonstrate two elements: (1) that Dr. Sabater was subjectively aware of a substantial risk to Bias's health, and (2) that Dr. Sabater disregarded that risk. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (holding that an "Eighth Amendment claimant" need only show "that the official acted or failed to act despite his knowledge of a substantial risk of serious harm"); *see also Gobert v. Caldwell*, 463 F.3d

339, 348-49 & n.29 (5th Cir. 2006). Since the first element inquires only into Dr. Sabater's subjective knowledge of a substantial risk, Bias was able to meet the prong without supplying expert testimony. *See Gobert*, 463 F.3d at 348 n.29 ("As we must focus on [the doctor's] subjective knowledge, expert testimony cannot create a question of fact as to what [the doctor] actually knew."). In fact, because "whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence," *Farmer*, at 842, Bias satisfied this element and allowed the factfinder to infer Dr. Sabater's subjective knowledge simply by demonstrating the obviousness of his condition and its risks. *See Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999). Similarly, Bias need not have provided expert testimony to establish the second element of his deliberate indifference claim; he met the second prong by presenting evidence allowing the trier of the facts to infer that Dr. Sabater, by acting or failing to act, disregarded a known substantial risk. *See Gobert* 463 F.3d at 349; *see also Farmer*, 511 U.S. at 842.

Here Bias alleged and introduced evidence of facts sufficient to prove these elements of deliberate indifference, and the district court, acting as fact-finder, found the evidence, as discussed above, sufficient to rule in Bias's favor.

We may not set aside a district court's factual finding unless it is clearly erroneous, *see Crawford v. Falcon Drilling Co., Inc.* 131 F.3d 1120, 1124 (5th Cir. 1997) (citing Fed. R. Civ. P. 52(a)), and based on my review of the record, I see no clear error here. The district court could have reasonably and correctly inferred from the record and video that Bias was in need of medical attention. The video documents twenty minutes of Bias's completely unconscious, limp body, which could not easily have been malingering. Given that Bias had attempted suicide and had been slipping in and out of consciousness for nearly three days, at the very

least, Bias's obvious, unconscious state required monitoring, and from the conspicuousness of this condition, the district court could reasonably have inferred that Dr. Sabater subjectively appreciated as much. [1]

Further, the record shows no clear error in the district court's determination that Dr. Sabater's actions amounted to a denial or delay of medical care to Bias. By approving Bias's transport in an ordinary van, Dr. Sabater terminated Bias's access to any medical treatment or attention; despite his condition, she isolated him in a cramped space for multiple hours. It is well within reason for the district court to have concluded that such constitutes a disregard for the substantial risks to Bias's health. This conclusion is bolstered by the fact that when Bias finally arrived at the Hendricks Medical Center and received proper treatment, he was immediately diagnosed as suffering from a drug overdose, as well as necrosis and other physical injuries he did not have when Dr. Sabater had him crammed into the van. So while Bias's condition may not necessarily have required a doctor constantly present, his comatose state did merit attention by some physician or medical technician, and Dr. Sabater's order not only denied him such attention but also caused him further injury as a result of his three-hour transportation

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[1] Dr. Sabater never testified at trial that she believed Bias to be "faking," but the record contains statements from prison officials involved in Bias's preparation for transport that report Dr. Sabater's making such "faking" accusations. *See* ROA vol. 2 p. 285; vol 6 p. 9; vol 6 p. 72-74. In light of the video, though, such a "faking" diagnosis is highly implausible. Thus, record evidence would allow the district court to discredit any assertion that Bias was merely faking and to conclude that Bias's obviously serious condition was known to Dr. Sabater.

Moreover, further record evidence also supports the conclusion that the seriousness of Bias's condition was obvious; for example, each doctor to examine Bias after his multiple-hour transport noted the seriousness of his condition. *See, e.g.*, ROA vol. 2 p. 289-90; ROA vol. 1 p. 178-79. In fact, Dr. Jackson, who examined Bias after he was rushed from the Robertson unit to Hendrick Medical Center, observed that he suspected, correctly, that Bias had been hoarding medications and that his condition was caused by an overdose. *See* ROA vol. 2 p. 289-90.

ordeal. Thus, I concur in finding that we should affirm the district court's judgment, and I cannot agree that expert testimony was necessary to prove this particular case. As discussed above, *Farmer*, 511 U.S. at 842, and *Gobert*, 463 F.3d at 348 & n.29, show that no expert testimony is needed to establish deliberate indifference in a case such as this because expert testimony cannot reveal Dr. Sabater's subjective knowledge and is unnecessary to establish that Dr. Sabater's actions amount to a disregard for Bias's condition. Also, *Estelle v. Gamble*, 429 U.S. 97, 107 (1976), the case cited by the dissent in support of the proposition that Bias's claim must be bolstered by expert testimony, appears to hold only that expert testimony is preferred as a general rule, and I find that Bias's obvious and emergent condition distinguishes the present case from *Estelle*.[2]

In sum, I find that the district court's judgment was not clearly erroneous. The trial judge heard testimony, watched the videotape, and made the credibility evaluations. The record shows that this determination was not clearly erroneous, so we are bound to affirm.

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[2] In *Estelle v. Gamble*, 429 U.S. 97, 107 (1976), the plaintiff complained of "lack of diagnosis and inadequate treatment of his back injury," specifically contending that his doctors should have x-rayed his back. *Id.* Though the plaintiff's medical condition in *Estelle* may have been quite painful, *id.* at 99-100, it was not emergent or life threatening, and the Plaintiff received continuous treatment over a three-month period. *Id.* at 107.

Unlike that case, Bias's comatose or near-comatose condition obviously evidenced a need for immediate attention or monitoring, but Dr. Sabater's orders isolated him from any such attention for a critical period of hours. In fact, had Dr. Sabater's orders been followed exactly, Bias would have been without medical attention for even longer. Dr. Sabater ordered and approved Bias's transport from the Allred Unit, near Wichita Falls, Texas, to the MontfordUnit, near Lubbock, Texas; the distance between these two locations is roughly 200 miles. Bias was actually transported only roughly 150 miles from the Allred Unit to the Robertson Unit in Abilene, Texas.

PRISCILLA R. OWEN, Circuit Judge, dissenting.

I respectfully dissent because there is absolutely no evidence that Dr. Sabater was negligent in her diagnosis and treatment of Michael Bias, much less evidence that Sabater was deliberately indifferent to a substantial risk of serious harm to Bias.[1] This is not a case in which we are evaluating a plaintiff's Complaint to see if it withstands a motion to dismiss. There has been a trial on the merits, and the district court found Sabater liable based on the testimony of Bias, who is a layman, and a 20-minute videotape, from which the district court concluded that Bias's condition "immediately prior to his transport out of the Allred Unit, was open and obvious." There was no expert testimony or expert opinion that Bias's condition was such that a reasonable health-care provider would have recognized that transporting Bias in a van to a psychiatric unit in another prison facility presented a risk of serious harm.

I do not take the position that expert testimony is required in every case in which it is alleged that a physician was deliberately indifferent to a patient's condition. But here, Dr. Sabater examined Bias and monitored him. At least two other health-care professionals were present during that assessment and monitoring. Sabater may have misdiagnosed Bias's condition, although there is no evidence that she did or that if she did, it amounted even to negligence. But misdiagnosis is not withholding treatment nor is it treatment that is consciously indifferent to a substantial risk of serious harm. Whether it would have been obvious to a reasonable physician that transporting Bias to another unit in a van presented a substantial risk of serious harm requires an expert's analysis. Bias, a layman and the only witness he

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[1] *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (holding that a prison official violates the Eighth Amendment only if she is deliberately indifferent "to a substantial risk of serious harm to an inmate.").

called at trial, cannot provide that analysis nor can federal judges, learned though they may be. The record in this case simply does not support a finding of deliberate indifference.

The district court's opinion reflects that Dr. Sabater's liability was predicated on three conclusions. The first was, "[t]he Court finds that a reasonable person would have known that her conduct in ordering the transportation of an inmate in Bias' condition to a prison unit 150 miles away, rather than providing immediate medical attention, would cause a significant delay, if not a complete denial, of medical care." The record is devoid of any evidence that Bias required immediate medical attention or that transporting him 150 miles would subject him to a substantial risk of injury. Only a health care expert could make such an assessment in this case, and there was no expert testimony or opinion from any source that was critical of Dr. Sabater's care of Bias.

The facts are essentially undisputed. Bias attempted suicide sometime during the evening of May 20 by slicing his wrist and ingesting prescription drugs he had surreptitiously saved over a period of almost a month. The district court did not find that Sabater had any responsibility for Bias's possession or ingestion of those drugs. Nor was Sabater on duty or present at the prison on May 20 when the suicide attempt occurred. Other medical personnel attended Bias after his attempt to take his own life, and when asked if he had taken any medication, he repeatedly replied that he had only taken what Sabater had prescribed and in the amounts prescribed. Bias's drug ingestion was not known to any prison official or attendee, including Dr. Sabater, until long after Bias had left the Allred facility.

Sabater saw Bias at approximately noon on the day after his suicide attempt. She examined him, concluded that he remained clinically depressed, and requested TDCJ to transfer Bias by its next available transport to the Montford Unit, where TDCJ's psychiatric unit was located.

The TDCJ van did not arrive until about 7:30 the next morning, May 22. Prison officials ordered Bias from his cell, but he did not respond. A use-of-force team was called to remove Bias from his cell, and the team recorded the events on videotape. The video shows Bias lying on his back, without clothing, on a "suicide blanket." The guards on the team ordered Bias to "wake up" and "open [his] eyes." Bias responded by raising his head and tilting it slightly. The guards used an ammonia inhalant, to which Bias responded with a groan and slight movement. The remainder of the video reflects that Bias appeared motionless and limp as the guards dressed him, handcuffed him, and laid him on a gurney. At least twice during the video, Dr. Sabater and a nurse appeared and took Bias's vital signs, which were normal. Dr. Sabater flashed a light in Bias's eyes and reported normal reactivity. Dr. Sabater testified at trial that based on those diagnostics and observations she concluded her original diagnosis of clinical depression explained Bias's physical condition. The videotape concludes with guards placing Bias in the TDCJ van on his back in a confined space.

Josie Grubbs, a nurse present during the transfer, told Allred investigators that "in hindsight a drug screen may have been [of] some assistance in determining Offender Bias's condition," but that she had no reason to believe that an overdose caused his condition. Curtis Cooper, an associate clinical psychologist also present, told the investigators that Bias was unresponsive to the ammonia inhalant and speculated his condition was due to "waxy flexibility," which he described as the brain and body working asynchronously. Cooper further stated that "although Dr. Sabater could have requested an opinion of another physician," that was not in her nature. Nonetheless, Cooper stated "Offender Bias's vital signs were within acceptable range and there was no other indicator present" to suggest an overdose.

This uncontradicted evidence does not support a finding of deliberate indifference. Bias's complaint at trial that Sabater should have done more does not raise a fact question, and the Supreme Court has held that such a complaint fails to demonstrate deliberate indifference.[2]

The district court seems to have based its finding of deliberate indifference largely, if not entirely, on the videotape. The second conclusion in the district court's opinion is that "the Court finds that plaintiff's condition on May 22, 1997 was an exceptional circumstance obviously requiring immediate medical attention. A review of the videotape along with the testimony presented at trial confirms this finding." However, the three health-care professionals who attended Bias while he was being prepared to be taken to the Montford Unit actually examined Bias. His eyes and pupils were examined. His vital signs were checked, more than once, and they were normal. None of the three attending professionals thought at the time that transporting Bias to the Montford Unit would place him at risk. All of this is undisputed. A layperson cannot independently draw the conclusion that Bias was at risk just because, in hindsight, it is now known that Bias was injured during the transportation.

The trip to the Robinson Unit lasted approximately three hours. Apparently, had the transport van gone directly to the Montford Unit, the travel time would have been about forty-five minutes longer. The district court deduced that Bias's limp condition when he was placed in the van made a substantial risk of serious harm obvious. But how does a limp condition allow a layman to conclude that travel in the back of a van for three hours creates such a risk? It is not intuitively or otherwise obvious that lying in a prone, immobile position for three hours presents a risk. Common experience suggests otherwise. There is simply

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[2] *Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

nothing in the record that permits the inferences the district court drew.

The third conclusion in the district court's opinion is similar to the others: "The Court finds that the plaintiff's condition on May 22, 1997, immediately prior to his transport out of the Allred Unit, was open and obvious, that Dr. Sabater was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, that she actually drew that inference and that her intentional failure to act caused a prolonged delay in medical care and resulted in substantial injury to Michael Bias." Here again, the nature of Bias's condition and the risks that transporting him posed were not matters about which a layperson has knowledge. If Dr. Sabater had entirely turned her back on Bias and refused to undertake any examination or treatment, this might well be a different case. But she did not. She ordered that he be sent to another facility for care, she continued to examine him, she monitored him, and other health care professionals assisted her. Her professional judgment may have been faulty, but there is no basis for concluding she was deliberately indifferent.

The term "deliberate indifference" is not self-defining,[3] but the Supreme Court frequently defines it in relation to negligence and, in cases such as this, medical malpractice.[4] The Court notes deliberate indifference "describes a state of mind *more* blameworthy than negligence."[5] Eighth Amendment liability for deliberate indifference requires "'*more than* ordinary lack of due care for the prisoner's interests or safety'"—i.e., more than medical malpractice.[6] In cases involving medical treatment, a prisoner's complaint that a physician was merely negligent in diagnosing or treating the prisoner fails to state a claim

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[3] *Farmer*, 511 U.S. at 836.

[4] *See, e.g., Estelle*, 429 U.S. at 107 (1976).

[5] *Farmer*, 511 U.S. at 835 (emphasis added).

[6] *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

under the Eighth Amendment.[7] "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."[8] The facts in this case present "a classic example of a matter for medical judgment."[9] "A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice."[10] Sabater made the medical decision to transfer Bias to the psychiatric unit at another prison. Without evidence of the standard of care that obtained, a court cannot determine that Sabater deviated from that standard, much less that she acted with deliberate indifference in treating and evaluating Bias. Establishing the standard of care requires specialized knowledge and training. Lay fact-finders cannot determine from their own observations whether a physician's course of conduct was proper.

The concurring opinion concludes that Bias's "obvious and emergent condition" distinguishes this case from *Estelle*. What may be "obvious and emergent" to a layman is a different question from what is obvious and emergent to a physician. Medical personnel routinely encounter patients whose prognosis looks extremely grave to the lay observer, but physicians using medical diagnostics would draw a very different conclusion. Laymen cannot judge whether transportation of a patient in Bias's condition posed a substantial risk of serious harm.

The concurring opinion cites this court's decision in *Gobert v. Caldwell*[11] for the proposition that "expert testimony cannot create a question of fact as to what [the doctor] knew," then reasons that Bias established the subjective knowledge prong of deliberate indifference because the factfinder could "infer . . . subjective

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[7] *Estelle*, 429 U.S. at 106.
[8] *Id.*
[9] *Id.* at 107.
[10] *Id.*
[11] 463 F.3d 339, 348 n.29 (5th Cir. 2006).

knowledge" from "the obviousness of [Bias's] condition and its risks."[12] Our decision in *Gobert* not only fails to support this conclusion, *Gobert* requires that we reverse and render judgment for Sabater in this case.

We correctly recognized in *Gobert* that an inmate "must first prove objective exposure to a substantial risk of serious harm"[13] and that "the decision whether to provide additional treatment is a classic example of a matter for medical judgment."[14] We do not reach the subjective knowledge element unless and until there is evidence of exposure to a substantial risk of serious harm. There is no such evidence in this case. It cannot be "inferred" by laymen. The footnote in *Gobert* on which the concurring opinion relies recognizes this.[15] However, the presence of a substantial health risk was not at issue in that case because the defendant physician acknowledged that he knew that developing a serious infection in the inmate's leg was a "concern."[16] Gobert's leg had been crushed below the knee when the garbage truck on which he was riding as a "'hopper'" collided with another vehicle, and he had surgery that included the placement of pins in his leg.[17] Gobert was continuously on antibiotics for more than two months, except

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[12] *Ante*, p. ____.

[13] 463 F.3d at 345.

[14] *Id.* at 346 (internal quotation marks omitted).

[15] *Id.* at 348 n.29 ("As we must focus on Caldwell's [a physician's] subjective knowledge, expert testimony cannot create a question of fact as to what Caldwell actually knew. *Campbell v. Sikes*, 169 F.3d 1353, 1368 (11th Cir. 1999) ('[S]ince the facts and circumstances of this case do not allow an inference that Sikes not only should have perceived the risk but also actually did perceive it, does the opinion testimony by Plaintiff's medical experts based on those same facts and circumstances provide the missing Farmer link? The answer is no.'). We caution that the expert testimony is only probative of what inferences Caldwell, himself, could have made; whether he should have made the connection is irrelevant to this analysis.").

[16] *Id.* at 349.

[17] *Id.* at 343-44.

for seven days at issue in the case, his wound frequently exuded puss and blood, including areas around the pins, and there was swelling and redness on occasion. The court therefore concluded in *Gobert* that the nature of the inmate's "wound itself posed a substantial health risk."[18] Within days of his release from prison, Gobert was diagnosed with a very serious infection of the bone in his injured leg.[19] The court nevertheless held, as a matter of law on summary judgment, that the "extremely high standard"[20] of deliberate indifference had not been met[21] in spite of the district court's conclusion that *numerous* fact issues existed regarding deliberate indifference, including "whether [the physician] looked at the medical records" and "whether or not other actions should have been taken."[22]

The Eleventh Circuit's decision in *Campbell v. Sikes*,[23] cited in *Gobert*, noted that "[p]roof that the defendant should have perceived the risk, but did not, is insufficient" to prove deliberate indifference.[24] In this case, we have no reliable evidence that there was a substantial

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[18] *Id.* at 349.
[19] *Id.* at 344.
[20] *Id.* at 346.
[21] *Id.* at 352.
[22] *Id.* at 347. The district court had ruled:
I . . . think there are just too many issues of fact . . . [concerning] whether he looked at the medical records; whether he should have seen [Gobert] the amount of times he saw him; whether he was prescribing or not prescribing. . . . I just see too many material issues of fact dealing with what Dr. Caldwell did or didn't do at appropriate times; whether he reviewed or didn't review the medical records; whether or not other actions should have been taken; whether or not the records that were developed at the Earl K. Long Hospital were appropriately sent and filed in his record; whether he even should have taken efforts to look at those records; whether x-rays should have been done earlier and reviewed earlier . . . whether there was probative evidence that Dr. Caldwell did perceive the plaintiff had an infection prior to August 7, whether or not he appropriately relied on what the medical records were . . . .
[23] 169 F.3d 1353 (11th Cir. 1999).
[24] *Id.* at 1364.

risk, much less that Sabater should have perceived or actually recognized a substantial risk to Bias such as necrosis from being transported in a van.

The concurring opinion concludes that "the fact that when Bias finally arrived at the Hendricks Medical Center and received proper treatment, he was immediately diagnosed as suffering from a drug overdose, as well as necrosis and other physical injuries he did not have when Dr. Sabater had him crammed into the van" establishes "disregard for the substantial risks to Bias's health."[25] None of the physicians or other health care providers who eventually diagnosed Bias were critical of the care that Sabater provided. They did not offer the objective evidence necessary to establish that at the time Sabater and the other health care professionals at the prison administered medical care, a substantial risk of serious harm to Bias existed. Bias did not have necrosis at that time. That condition undisputedly developed while he was in the van. Undoubtedly, Sabater and others failed to diagnose his drug overdose. But there is no evidence that the misdiagnosis even amounted to negligence. Nor is there evidence that placing Bias in a van, rather than an ambulance, posed a substantial risk of serious injury. A layman cannot make a determination that such a risk existed without the aid of expert testimony.

This is not a close case, and I must say that I am mystified by the reaction the videotape in this case has engendered. Respectfully, I must dissent.

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[25] *Ante*, p. _____.

## XIV Amendment to the United States Constitution

### § 1. Citizenship — Due process of law — Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

### § 2. Representatives — Power to reduce apportionment.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

### § 3. Disqualification to hold office.

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of

congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

**§ 4. Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**§ 5. Power to enforce amendment.**

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.